Drilltech Oilfield Services Ltd & Anor v Witech Sdn Bhd

HIGH COURT (MIRI) — SUIT NO 22–152 OF 1998(MR)
ABDUL AZIZ ABDUL RAHIM JC
25 JUNE 2003

Civil Procedure *— Costs — Interlocutory proceedings — Plaintiff unsuccessful in striking out defence — Whether defendant ought to be able to tax costs forthwith — Whether defendant entitled to have the costs taxed, the payment of such taxed cost to be deferred — Rules of the High Court 1980, O 56 r 4(1)*

Civil Procedure *— Costs — Taxation — Whether ruling postponing taxation of costs appealable — Whether such ruling a 'decision'— Whether ruling made in the course of a trial or hearing of any cause or matter — Courts of Judicature Act 1964, s 3*

In a suit between the parties, the senior assistant registrar ('SAR') dismissed, with costs, the plaintiff's application to strike out the defence. The SAR also dismissed, with costs, the plaintiff's application for security for costs. Both these decisions were upheld on appeal to the court. When the defendant's bills of costs came up for taxation, the SAR ordered a stay of the taxation of costs until the conclusion of the main action. The defendant appealed against the decision to stay the taxation. The plaintiff argued that the decision to stay the taxation until the conclusion of the proceedings on the substantive actions was interlocutory in nature. It was not a decision within the meaning of s 3 of the Courts of Judicature Act 1964 ('CJA') and O 56 r 1 of the Rules of the High Court 1980 ('RHC') and was thus not appealable. Further the plaintiff relied on O 59 r 4(1) of the RHC and the decision in *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 which held, as a general rule, that where the proceedings were purely interlocutory, costs of the proceedings should be settled at the end of the action, subject to the discretion of the trial judge to order otherwise if he thought fit.

Held, dismissing the appeal:

(1) There are two limbs to the definition of the word 'decision' in the amended s 3 of CJA. The first limb is that the decision, ruling, judgment or order does not finally dispose of the rights of the parties and the second limb is that the decision, ruling, judgment or order must be made in the course of a trial or hearing of any cause or matter. For a ruling or an order to be excluded from the definition of the word 'decision' in the amended s 3 CJA, both limbs must be satisfied. Otherwise that ruling or order would be appealable. The rulings which are the subject matter of this appeal were not made in the course of a trial or hearing of any cause or matter. These were rulings on matters that came up even before the trial commenced (see pp 654B–C, 656A–F); *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 CLJ 315 followed, *Dato' Seri Anwar Ibrahim v PP* [1999] 1 CLJ 537 distinguished.

(2) Order 59 r 4(l) uses the expressions 'payment of any costs' and 'require the costs to be paid'. Even with the use of these expressions in the rule, *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 had ruled that as a general rule the parties in interlocutory proceedings should wait till the end of the action for their costs, unless the court orders otherwise. The language used in O 59 r 4(1) does not warrant a distinction being made between the right to have the costs taxed and the right to the payment of such taxed costs (see p 657E–F); *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 followed, *Abdullah Hishan bin Hj Mohd Hashim, Dato' v Sharma Kumari Shukla (No 2)* [1999] 6 MLJ 584 not followed.

[Bahasa Malaysia Summary

Dalam suatu tindakan antara pihak-pihak tersebut, penolong kanan pendaftar ('PKP') telah menolak, dengan kos, permohonan plaintif supaya pembelaan yang difailkan dibatalkan. PKP telah juga menolak, dengan kos, permohonan plaintif bagi jaminan kos. Kedua-dua keputusan ini telah disahkan dalam rayuan kepada mahkamah. Apabila bil kos defendan dihadapkan untuk taksiran, PKP telah memerintahkan penangguhan taksiran kos sehingga selesai tindakan utama itu. Defendan telah merayu terhadap keputusan penangguhan taksiran kos. Plaintif berhujah bahawa keputusan penangguhan taksiran kos sehingga penyelesaian tindakan utama itu adalah interlokutori. Ia bukannya suatu keputusan dalam maksud s 3 Akta Mahkamah Kehakiman 1964 ('AMK') dan A 56 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') maka ia tidak boleh dirayu. Selanjutnya plaintiff bergantung kepada A 59 k 4(1) KMT dan keputusan dalam *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 yang memutuskan bahawa, amnya, bagi prosiding yang sekadar interlokutori sahaja, persoalan kos bagi prosiding tersebut harus diselesaikan pada penghujung tindakan tersebut, tertakluk kepada budibicara hakim perbicaraan memerintah sebaliknya sekiranya beliau menganggap perlu.

Diputuskan, menolak rayuan tersebut:

(1) Terdapat dua bahagian kepada definasi perkataan 'decision' dalam pindaan kepada s 3 AMK. Bahagian pertama memperuntukkan bahawa keputusan, arahan, penghakiman atau perintah tersebut tidak menyelesaikan secara muktamad hak-hak pihak-pihak yang terlibat dan bahagian kedua memperuntukkan bahawa keputusan, arahan, penghakiman atau perintah tersebut semestinya telah dibuat semasa pendengaran atau perbicaraan sesuatu kausa atau perkara. Untuk sesuatu arahan atau perintah dapat dikecualikan dari definasi perkataan 'decision' dalam s 3 AMK yang dipinda, kedua-dua bahagian perlu dipatuhi. Jika tidak, arahan atau perintah tersebut dapat dirayu. Arahan yang

dipersoalkan dalam rayuan ini tidak dibuat semasa pendengaran atau perbicaraan sesuatu kausa atau perkara. Arahan ini adalah mengenai perkara yang telah wujud sebelum perbicaraan tindakan ini dimulakan (lihat ms 654B–C, 656A–F); *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315 diikut, *Dato' Seri Anwar Ibrahim v PP* [1999] 1 CLJ 537 dibezakan.

(2) Aturan 59 k 4(1) menggunakan ungkapan 'payment of any costs' dan 'require the costs to be paid'. Walaupun dengan penggunaan ungkapan-ungkapan itu di dalam kaedah itu, *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 telah memutuskan bahawa amnya pihak-pihak di dalam prosiding interlokutari harus menunggu sehingga ke akhir tindakan mereka untuk kos, kecuali jika mahkamah memerintahkan sebaliknya. Bahasa yang digunakan di dalam A 59 k 4(1) tidak mewajarkan perbezaan dibuat di antara hak untuk mentaksirkan kos dan hak untuk dibayar kos yang ditaksir (lihat ms 657E–F); *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 diikut, *Abdullah Hishan bin Hj Mohd Hisham, Dato' v Sharma Kumari Shukla (No 2)* [1996] 6 MLJ 584 tidak diikut.]

Notes

For cases on costs in interlocutory proceedings, see 2 *Mallal's Digest* (4th ED, 2001 Reissue), paras 1666–1672.

For cases on taxation of costs, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1823–1878.

Cases referred to

Abdullah Hishan bin Hj Mohd Hashim, Dato' v Sharma Kumari Shukla (No 2) [1999] 4 AMR 3823 (not folld)

Dato' Seri Anwar Ibrahim v PP [1999] 1 CLJ 537 (refd)

Hai Yue Hin v Public Feedmill (M) Sdn Bhd [1997] 3 MLJ 730 (folld)

Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd [1990] 1 MLJ 304 (refd)

Sitrac Corp Sdn Bhd v Lim Siew Eng [2002] 3 MLJ 315 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 3

Rules of the High Court 1980 O 56 r 1, O 59 r 4(1)

Stephen Chung (*Stephen Robert & Wong*) for the plaintiff/respondent:
Tai Choi Yu (*Tai Choi Yu & Co*) for the defendant/appellant

Abdul Aziz Abdul Rahim JC: This is an appeal by the defendant to a judge in chambers against the decision of the senior assistant registrar ('SAR') to stay the taxation of costs until the conclusion of the main action. The facts of the case appears in the written submission of the plaintiff's counsel and which I now reproduce:

(1) The defendant filed three notices of taxation, all dated 16 July 2002 and marked as encll 122, 124 and 126 respectively.

(2) The three notices of taxation were filed pursuant to the following court orders awarding costs to the defendant:

Enclosure 122

Order dated 20 October 1999 by the deputy registrar dismissing the plaintiff's application to strike out the defence and with costs to the defendant; and the order dated 19 July 2000 made by the Judicial Commissioner Dato' Sulaiman bin Daud (as he then was) dismissing the plaintiff's appeal against the decision of the deputy registrar on the dismissal of the plaintiff's application to strike out the defence with costs to the defendant. This order was in fact given on 4 September 2000. The hearing of the appeal was on 19 July 2000.

Enclosure 124

Order dated 28 June 2002 made by the senior assistant registrar ('SAR') ordering that the plaintiff's application for security for costs be dismissed with costs to be taxed and paid to the defendant unless agreed.

Enclosure 126

Order dated 8 May 2002 made by the Judicial Commissioner Dato' Sulaiman bin Daud (as he then was) dismissing the plaintiff's appeal against the decision of the senior assistant registrar on security for costs in favour of the Defendant and with costs to the Defendant.

(2) The three notices of taxation came on for hearing before the senior assistant registrar on 4 September 2002. During the hearing, the plaintiff's raised a preliminary objection that as the decisions to award costs to the defendant were obtained at interlocutory proceedings, in the absence of any order that such costs be paid forthwith, the general rule is that costs or taxation of costs shall be dealt with at the conclusion of the proceedings.

(3) The learned SAR allowed the preliminary objection and stayed the taxation of costs until the conclusion of the proceedings.

(4) The defendant being dissatisfied with the decision of the learned SAR has appealed against that decision to Yang Arif in chambers.

(5) Today is for the hearing of the defendant's said appeal.

The Plaintiff opposed the appeal on two grounds.

(a) The appeal is not competent because the decision of the SAR is not appealable.

(b) There are no merits in the appeal.

On the first ground, counsel for the plaintiff submitted that the decision of the SAR to stay the notices of taxation until the conclusion of the proceedings on the substantive actions was a decision or ruling made in the

course of a trial or hearing of any cause or matter. It was interlocutory in nature. Therefore the decision of SAR is not a decision within the meaning of s 3 of the Courts of Judicature Act 1964. Counsel for the plaintiff further submitted that the word decision in O 56 r 1 of the Rules of the High Court 1980 should be given the same meaning as in s 3 of the Courts Judicature Act 1964. Hence, the decision of the SAR is not appealable. Before the amendment was made to s 3 of Courts Judicature Act with regard to the expression 'decision', by Amendment Act 1031/98 which came into force on 31 July 1998, the word 'decision' was defined to mean 'judgment, sentence or order'. But after the amendment came into force, the word 'decision' in s 3 of Courts Judicature Act is defined as:

> 'decision' means judgment, sentence order, but does not include any ruling made in the course of trial or hearing or any cause or matter which does not finally dispose of the rights of the parties;

The Court of Appeal in *Dato' Seri Anwar Ibrahim v PP* [1999] 1 CLJ 537 had deliberated on the effect of the amendment and concluded that after the amendment the new definition of 'decision' does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. These matters, the Court of Appeal said, are matters which are termed as interlocutory. At p 549 of the report, Justice NH Chan JCA in delivering the judgment of the court says (as in the effect of the amendment) as follows:

> Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s 3 of the Courts of Judicature Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals. For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even though not conclusive (final) of the main dispute, may be conclusive (final) as to the subordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.

Although the judgment in *Dato' Seri Anwar* was a judgment in respect of a bail application in a criminal case, its pronouncement as to the effect of the amendment to s 3 of the Courts Judicature Act by the Amendment Act A1031 is very pertinent and relevant to the present case.

But in *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315 Abdul Aziz J (as he then was) ruled that whether a decision is a ruling that is excluded by the excluding clause in the definition of 'decision' in s 3 of the Courts Judicature Act is a question of statutory interpretation. The learned judge went on to say that the words 'ruling made in the course of a trial or

hearing of any cause or matter' must also be considered in order to determine the true scope of the meaning of the word 'decision' in s 3 of the Courts Judicature Act as amended. At p 318–319 of the report the learned judge says this:

> In contending that the dismissal of the striking out application is not appealable, learned counsel for the respondent focuses on the words 'does not finally dispose of the rights of the parties'. His submission comes down to this, that the rights of the parties will finally be disposed of only when the respondent's claim in the action is either dismissed or allowed, and that since the dismissal of the appellants' striking out application leaves intact the respondent's claim as yet to be finally adjudicated, the dismissal of the striking out application did not finally dispose of the rights of the parties and was therefore not a 'decision' and is not appealable.
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> That may be right as far as the words "does not finally dispose of the rights of the parties" are concerned, but they are not the only words that need to be considered. The words "ruling made in the course of a trial or hearing of any cause or matter" must not be overlooked. For a ruling to be not a "decision", it is not enough that it does not finally dispose of the rights of the parties. The ruling must also be one made in the course of a trial or hearing of any cause or matter. Even if the dismissal of the striking out application did not finally dispose of the rights of the parties, the question must be considered whether it was a ruling made in the course of a trial or hearing of any cause or matter. If it was not, it is not excluded by the definition of 'decision' and is therefore appealable. That question has not been addressed by the respondent's counsel.
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> A clear example of a ruling made in the course of a trial of a cause or matter is a ruling on a question arising in the course of the trial — which ruling is, as it must necessarily be, made in the course of the trial — whether a particular document is admissible in evidence. A clear example of a ruling made in the course of a hearing of a cause or matter is where, in the course of the hearing of, say, an originating summons, a ruling is made, on a question arising in the course of the hearing, whether an affidavit ought to be disallowed.
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> The dismissal in this case of an appellants' striking out application was clearly not, in my opinion, a ruling made in the course of a trial or hearing of any cause or matter, and is therefore appealable. It is out of the question that it was made in the course of the trial of the respondent's action. The trial had not even commenced. Neither was it a ruling made in the course of the hearing of the striking out application, because the decision to dismiss the application was made after, not in the course of, the hearing of the application. Moreover, a ruling made in the course of the hearing of an application must be a ruling on some point other than the ultimate question whether the application is to be allowed or dismissed.

As I understand it, what the learned judge said is this. There are two limbs to the definition of the word 'decision' in amended s 3 of the Courts of Judicature Act. The first limb is that the decision, ruling, judgment or order does not finally dispose of the rights of the parties and the second limb is that the decision, ruling, judgment or order must be made in the course of

a trial or hearing of any cause or matter. For ruling or order to be excluded from the definition of the word 'decision' in the amended s 3 of the Courts of Judicature Act, it must satisfy both limbs, if not that ruling or order is appealable. The learned judge distinguishes the decision in *Dato Seri Anwar* on this point at p 319 of the report, as follows:

> My opinion that the dismissal of the appellants' striking out application is appealable is at odds with the decisions of Richard Malanjum J in *Kee Yeh Maritime* Co Ltd *v Coastal Shipping Sdn Bhd* [2000] 4 AMR 4190 and Teoh *Poh Keong Sdn Bhd v Shinhan Engineering & Construction Co Ltd* [2001] 2 MLJ 50. That it necessarily so because Richard Malanjum J, it would seem, was not, or did not feel, called upon to consider the words 'ruling made in the course of a trial or hearing of any cause or matter'.
>
> Whether a decision is a ruling that is excluded by the excluding clause in the definition of 'decision' in s 3 of the CJA [Courts of Judicature Act 1964] is a question of statutory interpretation of that clause. In my opinion it is, I say with respect, an incorrect approach to the interpretation of that clause to begin, as it seems to me was done by Richard Malanjum J and the respondent's counsel in his written submission, by asking the question whether the decision is a final order or an interlocutory order, and I say so because the term 'final order' or 'interlocutory order' is not used in the excluding clause. It is the actual words used in the excluding clause that have to be considered.

Although I am bound by the decision of a superior court, namely the Court of Appeal in *Dato' Seri Anwar*, I am inclined to follow the decision in *Sitrac Corporation* since I think the distinguishing factor between the two cases is very pertinent. Furthermore looking at the decisions which are the subject matter of this appeal, it is obvious that these are rulings that were made not in the course of a trial or hearing of any cause or matter. These are rulings on matters that came up even before the trial commenced. In the circumstances therefore I find that this ground of objection of by the plaintiff has no merit.

On the second ground, the plaintiff relied on the O 59 r 4(1) of the Rules of the High Court 1980 and the decision of the Court of Appeal in *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730 which discussed the scope of O 59 r 4(1) of the Rules of the High Court 1980 and held that as a general rule, where the proceedings were purely interlocutory, costs of the proceedings should be settled at the end of the action subject to the judge's discretion to order otherwise if he thinks fit.

In *Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd* [1990] 1 MLJ 304 the court held that costs in interlocutory proceedings should be made payable forthwith or in any event when party against whom the order was made has been guilty of oppressive or unreasonable conduct or that the party has taken unnecessary conduct or that the party has taken unnecessary or improper action.

It is also a settled law that if the order for costs states costs in any event to the plaintiff or 'costs to be paid forthwith' then the party who is entitled to his costs may have his costs taxed and paid to him without wanting for the final outcome of the action.

A In this regard, I am bound by the ratio decidendi in *Hai Yue Hin* which is a Court of Appeal decision.

My difficulty here is that in *Abdullah Hishan bin Hj Mohd Hashim, Dato' v Sharma Kumari Shukla (No 2)* [1999] 4 AMR 3823, which is a High Court decision and relied upon by the defendant in this appeal, Justice Kamalanathan Ratnam, though following the decision in *Hai Yue Hin* and *Ko Ko Ma*, drew a distinction between the right of the party to have his costs taxed immediately and the right of that party to have his taxed costs paid forthwith. At p 3827 of the report the following passage stated in the learned judges' judgment:

> However, as to whether such taxed costs ought to be paid forthwith is another issue. If the order states 'costs in any event to the plaintiff to be taxed and paid forthwith' then it is clear what the order means. Otherwise it is my judgment that whilst the plaintiff is allowed to tax his costs the payment ought to await the final outcome of the full trial. This view is clearly in line with the decision of the Court of Appeal in *Hai Yue Hin* [*Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730] wherein Shaik Daud JCA who gave the decision of the court opined that since the question of costs is left to the discretion of the court, unless there is an order that the costs be paid forthwith, the costs should only be paid after the conclusion of the proceedings.

In my view it is not necessary to make such a distinction. A careful reading of O 59 r 4(1) shows that the expressions used in the rule are 'payment of any costs' and 'required the costs to be paid'. Even with these expressions in the rule, Hai Hue Yin had ruled that as a general rule the parties in interlocutory proceedings should wait till the end of the action for their costs, unless the court orders otherwise. In my view the language used in O 59 r 4(1) does not warrant such a distinction to be made. Therefore I am inclined not to follow the decision in *Abdullah Hishan* in so far as the distinction between the right to have the costs taxed forthwith and the payment of the taxed costs. I may also note here that in *Abdullah Hishan* the court revised the decision to have the costs taxed and paid forthwith because the court found for a fact that in that case the applicant knew or ought to know that he could not succeed in an application for summary judgment under O 14 r 1 where the issue of illegality is being pleaded. I do not find such circumstances in the present appeal. Therefore the plaintiff's second ground of objection was well taken and I agree there is no merit in this appeal.

In the circumstances, I dismissed the appeal.

Appeal dismissed.

Reported by Sivapragasam Kumaran